

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DOUGLAS SKINNER,

Petitioner,

v.

Case No. 05-CV-73632-DT

TIM LUOMA,

Respondent,

**ORDER DENYING PETITIONER'S MOTION FOR A CERTIFICATE OF
APPEALABILITY AND DENYING LEAVE TO APPEAL IN FORMA PAUPERIS**

On May 17, 2006, the court issued an opinion and order summarily dismissing Petitioner's application for writ of habeas corpus on the ground that the petition had not been filed in compliance with the one year statute of limitations contained in 28 U.S.C. § 2244(d)(1). Petitioner has now filed a motion for a certificate of appealability. For the reasons stated below, the court will deny Petitioner a certificate of appealability. The Court will also deny Petitioner leave to appeal *in forma pauperis*.

I. STANDARD

28 U.S.C. § 2253(c)(1)(A) and F.R.A.P. 22(b) state that an appeal from the district court's denial of a writ of habeas corpus may not be taken unless a certificate of appealability is issued either by a circuit court or district court judge. If an appeal is taken by an applicant for a writ of habeas corpus, the district court judge shall either issue a certificate of appealability or state the reasons why a certificate of appealability shall not issue. F.R.A.P. 22(b). To obtain a certificate of appealability, a prisoner must

make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

When a district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a certificate of appealability should issue, and an appeal of the district court's order may be taken, if the petitioner shows that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petition should be allowed to proceed further. In such a circumstance, no appeal would be warranted. *Id.*

II. DISCUSSION

In the present case, for reasons stated in greater detail in the order of summary dismissal, the court found that Petitioner's application for a writ of habeas corpus was time-barred, because it had not been filed within the one year statute of limitations contained in 28 U.S.C. § 2244(d)(1).

Petitioner is not entitled to a certificate of appealability, because he has failed to make a substantial showing that this court's ruling that the limitations period was not tolled by his filing of his state post-conviction motion after the expiration of limitations period would be debatable among jurists of reason. *See Herdt v. Uphoff*, 15 Fed. Appx.

691, 692-93 (10th Cir. 2001). Petitioner is also not entitled to a certificate of appealability, because he failed to make a showing, for reasons stated in greater detail in the order of summary dismissal, that he was entitled to equitable or statutory tolling of the limitations period. See *May v. Workman*, 339 F. 3d 1236, 1237 (10th Cir. 2003). Finally, because Petitioner's actual innocence argument was insufficiently convincing, he is not entitled to a certificate of appealability on this issue. See e.g. *Whitebird v. Snider*, 28 Fed. Appx. 783, 786 (10th Cir. 2001).

The court will deny Petitioner a certificate of appealability, because reasonable jurists would not find it debatable whether the court was correct in determining that Petitioner had filed his habeas petition outside of the one year limitations period. See *Grayson v. Grayson*, 185 F. Supp. 2d 747, 753 (E.D. Mich. 2002). The court will also deny Petitioner leave to appeal *in forma pauperis*, because the appeal would be frivolous. *Id.*

III. CONCLUSION

Based upon the foregoing, IT IS ORDERED that Petitioner's motion for a certificate of appealability [Dkt. # 34] is DENIED.

IT IS FURTHER ORDERED that Leave to Appeal *In Forma Pauperis* is DENIED.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: June 16, 2006

I hereby certify that a copy of the foregoing document was mailed to counsel of record

on this date, June 16, 2006, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522